IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 13, 2006 Session

ELIAS H. ATTEA, JR. v. ANDREW S. ERISTOFF ET AL.

Appeal from the Chancery Court for Cheatham County
No. 12576 George C. Sexton, Judge

No. M2005-02834-COA-R3-CV - Filed on May 18, 2007

This appeal involves a dispute between a Tennessee resident and two taxing authorities of the State of New York involving the Tennessee resident's business activities in New York. The Tennessee resident filed suit against the New York taxing authorities in the Chancery Court for Cheatham County, alleging that their telephone calls and letters attempting to collect the disputed taxes amounted to intentional infliction of emotional distress. The taxing authorities moved to dismiss the complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief could be granted. The trial court granted the motion after concluding that it lacked personal jurisdiction over the New York Taxing authorities. The Tennessee resident appealed. We have determined that the trial court properly concluded that it lacked personal jurisdiction and that the complaint was also due to be dismissed for both lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Phillip L. Davidson, Nashville, Tennessee, for the appellant, Elias H. Attea, Jr.

Charles A. Trost, Jennifer L. Weaver, and Brett R. Carter, Nashville, Tennessee, for the appellees, Andrew S. Eristoff and Jorge Reyes.

OPINION

I.

Elias H. Attea, Jr. is licensed as an Indian trader by the United States Bureau of Indian Affairs. Since 1985, Mr. Attea has sold cigarettes to the Mohawk Indians on the St. Regis Reservation in the State of New York and in Canada. In the late 1980s, Mr. Attea moved from New York to Tennessee. He continued selling cigarettes to the Mohawks after he moved to Tennessee.

Mr. Attea filed New York non-resident income tax returns from 1988 through 1993. In 1995, the New York State Department of Taxation and Finance ("Department") initiated audits of Mr. Attea's 1990 and 1991 returns. Mr. Attea challenged the results of the audits in both New York and Tennessee, resulting in lengthy administrative and judicial proceedings, all of which ended unfavorably to Mr. Attea in 2001.[1] The Department then recommenced audits of Mr. Attea's 1992 and 1993 returns that had been held in abeyance pending the outcome of Mr. Attea's challenges to the 1990 and 1991 audits.

On July 11, 2005, with proceedings still pending in New York, Mr. Attea filed a complaint against Andrew S. Eristoff, the Commissioner of the Department, and Jorge Reyes, the director of the Income Tax Section in the Department's district office in Buffalo, seeking injunctive relief and damages for intentional infliction of emotional distress. In an amended complaint filed September 12, 2005, Mr. Attea claimed that "[i]n furtherance of their objectives to collect income taxes . . . for the years 1992 and 1993, the Defendants have harassed and intimidated the Plaintiff by making demands upon him by phone calls and correspondence to him at his address in Cheatham County." He speculated that Messrs. Eristoff and Reyes were "likely to demand to inspect [his] house and his records" in Tennessee and asserted it was against the public policy of Tennessee to allow another state to collect income taxes from him on income he accumulated from out-of-state sources while living in Tennessee.

Mr. Attea accused the Department of engaging in a number of actions he deemed improper, such as challenging his putative change of domicile to Tennessee, imposing burdensome audits on him, and threatening to assess taxes against him along with associated fines, interest, and penalties. In addition, he claimed that New York State's administrative procedures for challenging tax assessments deprived him of due process of law. Mr. Attea sought permanent injunctive and declaratory relief to stop the ongoing New York proceedings plus one million dollars in damages.

Two weeks later, Messrs. Eristoff and Reyes moved to dismiss the amended complaint for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief could be granted under Tenn. R. Civ. P. 12.02(1), (2), and (6). Following a hearing, the trial court entered a December 9, 2005 order dismissing the amended complaint for lack of personal jurisdiction. Mr. Attea appealed.

II.

Mr. Attea takes issue with the trial court's conclusion that it lacks personal jurisdiction over Messrs. Eristoff and Reyes. Messrs. Eristoff and Reyes contend that the trial court's determination regarding personal jurisdiction was correct and assert that even if it was not, we should affirm the dismissal of the case because the trial court lacks subject matter jurisdiction over Mr. Attea's claims

[1] *In re Attea*, 732 N.Y.S.2d 722, 724 (App. Div. 2001).

and the amended complaint fails to state a cause of action upon which relief can be granted.[2] As explained below, we have determined that dismissal of the case was proper on all three grounds raised by Messrs. Eristoff and Reyes.

A.
PERSONAL JURISDICTION

The trial court concluded that it lacked personal jurisdiction over Messrs. Eristoff and Reyes under Tennessee's so-called "long-arm statute." Tenn. Code Ann. § 20-2-214 (1994). The statute permits Tennessee courts to exercise personal jurisdiction over a non-resident defendant on any basis that does not violate the Tennessee or United States Constitutions. *Chenault v. Walker*, 36 S.W.3d 45, 52 (Tenn. 2001); *J.I. Case Corp. v. Williams*, 832 S.W.2d 530, 531 (Tenn. 1992) ("This statute reaches as far as the Due Process Clause of the Fourteenth Amendment permits."). Thus, the critical question is whether the trial court's exercise of personal jurisdiction over Messrs. Eristoff and Reyes would comport with the requirements of due process. We conclude that it would not.

1.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects an individual's liberty interest in being free from binding judgments of a forum with which he or she has no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 2181 (1985); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S. Ct. 154, 160 (1945). Due process requires that individuals be given "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign." *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472, 105 S. Ct. at 2182 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S. Ct. 2569, 2587 (Stevens, J., concurring in the judgment)). When a state court seeks to assert specific jurisdiction over a non-resident defendant who has not consented to suit there, the requirement of fair warning is satisfied as long as the defendant has "purposefully directed" his or her activities at residents of the forum state, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 1478 (1984), and the litigation stems from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 & n.8, 104 S. Ct. 1868, 1872 & n.8 (1984).

The touchstone of the due process analysis is whether the non-resident defendant has purposefully established "minimum contacts" in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 474, 105 S. Ct. at 2183; *Int'l Shoe Co. v. Washington*, 326 U.S. at 316, 66 S. Ct. at 158. Foreseeability of causing injury in the forum state alone is insufficient to satisfy the requirements of due process. *Burger King Corp. v. Rudzewicz*, 471 U.S. at 474, 105 S. Ct. at 2183; *World-Wide*

[2] As long as the trial court reached the correct result, we may affirm the judgment, even though we may disagree with some or all of the trial court's reasoning. *Cont'l Cas. Co. v. Smith*, 720 S.W.2d 48, 50 (Tenn. 1986); *In re Estate of Boote*, 198 S.W.3d 699, 718 & n.28 (Tenn. Ct. App. 2005); *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49, 60 & n.18 (Tenn. Ct. App. 2004).

Volkswagen Corp. v. Woodson, 444 U.S. 286, 295, 100 S. Ct. 559, 566 (1980). Rather, the question is whether "the defendant's conduct and connection with the forum State are such that he [or she] should reasonably anticipate being haled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. at 474, 105 S. Ct. at 2183; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297, 100 S. Ct. at 567.

The United States Supreme Court has repeatedly emphasized that in making this determination, "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. at 474, 105 S. Ct. at 2183; *Kulko v. Superior Court of Cal. in and for City and County of San Francisco*, 436 U.S. 84, 93-94, 98 S. Ct. 1690, 1698 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-40 (1958). To the contrary, it is essential in each case that there be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Asahi Metal Ind. Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 109, 107 S. Ct. 1026, 1030 (1987); *Hanson v. Denckla*, 357 U.S. at 253, 78 S. Ct. at 1240.

2.

The trial court determined that Mr. Attea failed to show that Messrs. Eristoff and Reyes had the "minimum contacts" with Tennessee necessary to satisfy the requirements of due process. We agree. There record is devoid of any indication that Messrs. Eristoff or Reyes "purposely derived benefit" from activities within Tennessee, *Kulko v. Superior Court of Cal. in and for City and County of San Francisco*, 436 U.S. at 94-96, 98 S. Ct. at 1698-99, or "purposely directed" their activities toward any Tennessee residents other than Mr. Attea, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. at 774, 104 S. Ct. at 1478. It is undisputed that Messrs. Eristoff and Reyes never once personally entered the state of Tennessee and Mr. Eristoff never so much as made a telephone call to Mr. Attea here. The only reason Messrs. Eristoff and Reyes were dealing with a Tennessean at all was because Mr. Attea, who moved from New York to Tennessee in the late 1980s, continued to transact significant amounts of business in the state of New York for many years thereafter and filed non-resident income tax returns there. In short, Messrs. Eristoff and Reyes's connections with Tennessee resulted solely from Mr. Attea's unilateral decision to move here from New York while continuing to conduct business there. On this record, we cannot conclude that haling Messrs. Eristoff and Reyes into a Tennessee court would comport with traditional notions of fair play and substantial justice. Accordingly, the trial court did not err in determining that it lacked personal jurisdiction over the defendants.

B.
SUBJECT MATTER JURISDICTION

Messrs. Eristoff and Reyes maintain that even if the trial court could have constitutionally exercised personal jurisdiction over them, the dismissal of the case should still be affirmed based on a lack of subject matter jurisdiction. Regardless of whether the trial court had subject matter

jurisdiction or not, we hold that it should have declined to exercise that jurisdiction given the ongoing proceedings in New York.

Tennessee law establishes special procedures for the resolution of tax disputes. Tenn. Code Ann. §§ 67-1-1801 to -1807 (2006 & Supp. 2006). The statutory scheme designates specific administrative and judicial bodies to hear the various types of challenges to tax assessments. Tenn. Code Ann. § 67-1-1804 vests "sole and exclusive jurisdiction for determining liability for all taxes" in the bodies named in the statutes. In 1991, the Tennessee Supreme Court confronted the question whether the sole and exclusive jurisdiction statute deprived a Tennessee trial court of jurisdiction to entertain various constitutional challenges to application of the new law brought by a non-resident defendant. *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d 292 (Tenn. 1991).

In 1987, the Tennessee General Assembly adopted legislation expanding the scope of Tennessee's sales and use taxes on out-of-state entities selling goods directly or indirectly into the state. L.L. Bean, Inc., a Maine corporation with its principal place of business in Maine, sold products through the mail to customers in Tennessee. When the new legislation went into effect, the Tennessee Department of Revenue wrote to L.L. Bean requesting that it register with the Department and begin collecting sales and use taxes from its Tennessee customers. The company cooperated at first and even voluntarily allowed the Tennessee Department of Revenue to inspect its books and records related to its Tennessee sales. The era of cooperation ended shortly thereafter when the Commissioner of Revenue issued a summons demanding to see all books and records pertaining to sales and shipments to Tennessee customers for a particular six-month period.

L.L. Bean filed suit against the Tennessee Department of Revenue in the Chancery Court for Davidson County. L.L. Bean requested permanent injunctive and declaratory relief to prevent the Tennessee Department of Revenue from obtaining access to its records and to bar it from applying the new legislation to the company's Tennessee sales. The company asserted that the new legislation violated the Commerce Clause of the United States Constitution and the Due Process Clause of the Fourteenth Amendment. The Tennessee Department of Revenue filed a motion to dismiss the complaint for lack of subject matter jurisdiction, and the trial court granted the motion. The Tennessee Supreme Court affirmed the trial court's judgment based on the sole and exclusive jurisdiction provision of Tenn. Code Ann. § 67-1-1804 and the policy considerations behind the federal Tax Injunction Act of 1937.[3] *L.L. Bean, Inc. v. Bracey*, 817 S.W.2d at 296-97. The court reasoned that proceedings authorized by the statutory scheme provided L.L. Bean with an adequate forum for raising its constitutional objections to the application of the new law.

New York, like Tennessee, has established special procedures for the resolution of tax disputes. *See e.g.*, N.Y. Tax Law §§ 689-692, 2008, 2016 (McKinney 2007); N.Y. Real Prop. Tax § 700-727 (McKinney 2007). As in Tennessee, New York law provides that the review procedures

[3]The Tax Injunction Act of 1937 bars federal district courts from enjoining, suspending, or restraining "the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C.A. § 1341 (West 2007).

outlined in the statutory scheme constitute the "exclusive remedy available to any taxpayer" for challenging a tax assessment. *See e.g.*, N.Y. Tax Law § 690(b); *see also Banking Trust Corp. v. New York City Dep't of Fin.*, 805 N.E.2d 92, 96 (N.Y. 2003). As one might expect, New York's review procedures do not precisely mirror Tennessee's. Nevertheless, New York's statutory scheme protects key elements of due process such as the right to notice and an opportunity to be heard, the ability to present documentary evidence in support of one's claims, and appellate review of administrative determinations by an independent judicial tribunal. N.Y. Tax Law §§ 689(a), 690(a), 2000-2026; *see also In re Attea*, 732 N.Y.S.2d at 722-24.

The decision in *L.L. Bean, Inc. v. Bracey* stands for the proposition that Tennessee trial courts lack subject matter jurisdiction to interfere in an ongoing administrative proceeding between a taxpayer and the Tennessee Department of Revenue. Authorizing Tennessee courts to embroil themselves in ongoing administrative tax proceedings of other states with similar exclusive jurisdiction statutes while simultaneously prohibiting them from interfering in identical Tennessee administrative proceedings would be a great insult to the other states and would tend to undermine interstate comity. We have no doubt that if the issue were brought before it, the Tennessee Supreme Court would extend the rule of *L.L. Bean, Inc. v. Bracey* to suits filed in Tennessee courts designed to disrupt ongoing administrative tax proceedings in other states. Accordingly, even if the trial court had personal jurisdiction over the defendants, it lacked subject matter jurisdiction to adjudicate Mr. Attea's claims.

C.
FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED

To state a claim for intentional infliction of emotional distress, a plaintiff must allege that the defendant's conduct was: (1) intentional or reckless; (2) so outrageous that it cannot be tolerated in a civilized society; and (3) the cause of serious mental injury to the plaintiff. *Bain v. Wells*, 936 S.W.2d 615, 622 (Tenn. 1997). The defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." *Miller v. Willbanks*, 8 S.W.3d 607, 614 (Tenn. 1999) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d, at 73 (1965). In our view, the conduct alleged by Mr. Attea falls far short of these requirements.

Mr. Attea alleges that Messrs. Eristoff and Reyes engaged in conduct such as challenging his putative change of residency from New York to Tennessee and threatening to assess taxes against him along with accompanying fines, interest, and penalties. Far from being so outrageous that it cannot be tolerated in a civilized society, the conduct alleged by Mr. Attea strikes us as somewhat ordinary in the context of a hotly contested tax dispute. We think it safe to assume that no one enjoys being audited. But if the courts were to recognize a cause of action for intentional infliction of emotional distress based on nothing more than the inconvenience and frustration involved in a routine tax audit, there would be no end to the lawsuits, and state and federal tax authorities would be seriously hampered in their ability to perform their important jobs.

Mr. Attea asks this court to write a truly extreme version of the ancient tort of outrage into Tennessee law. We decline to do so. Accordingly, even if the trial court erred in concluding it lacked personal jurisdiction over the defendants, its dismissal of the lawsuit was proper because the amended complaint failed to state a claim upon which relief could be granted.

III.

We affirm the trial court's December 9, 2005 order dismissing Mr. Attea's amended complaint for the reasons stated in this opinion. We tax the costs of this appeal to Mr. Attea and his surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.